

A LAWYER'S APPROACH TO COMMERCIAL ARBITRATION

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WE hear a lot about commercial arbitration. We learn of money spent to insure its aggrandizement, of laws being passed to encourage and enforce it despite opposition by the American Bar Association,¹ of codes adopted under the NRA recommending its use for entire industries, and standardized contracts utilized by trade associations providing for it as the sole method for settling disputes thereafter arising.² It is praised because of its speed, friendliness, economy and expert justice. It is rarely damned publicly, but much that is said about it in private conversations among the profession is far from courteous. The more the practitioner hears of the generalized praise so commonly current, and the more he reads the generalized propaganda treating it as an unfailing panacea for satisfactory resolution of business controversies, while simultaneously noting an ever increasing number of particularized contested and vitiated arbitrations in the law reports, the more puzzled he becomes. He queries: "What shall I advise my clients regarding it?" He even worries: "May I advise them regarding it, or will they act spontaneously on business editorials instead of on legal advice?" A knowledge of how satisfactorily to answer the first question will eliminate the necessity of the second.

There is at the outset a difference between the problem ordinarily confronting the lawyer in his office and the lawyer at a Bar Association convention. In his office he is concerned primarily with the advice to be given to an individual client, with the application of certain legal principles to a given case. In the Bar Association convention, he is, like the student on a legal examination, more often concerned with generalized statements, and acts on a much higher plane of idealism than is warranted—or even professionally allowable—in the ordinary advice to a client. Whether trained in the quintessence of Frankian functionalism or steeped in the ideology of Langdellian case-ology, the practitioner, in the individual case, must become specific. His advice to a client regarding arbitration should be based, not on utilitarian generalities, but on whether or not, considering the economic factors and legal

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1. Cf. (1925) 50 A. B. A. REP. 135 et seq., 577 et seq. But cf. the various reports of the Arbitration Committee of the City of New York in 31, 37 and 39 REPORTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

2. Cf. KELLOR, *ARBITRATION IN THE NEW INDUSTRIAL SOCIETY* (1934) *passim*; Phillips, *Commercial Arbitration Under the N.I.R.A.* (1934) 1 U. OF CHI. L. REV. 424.

rules regarding it, it will pay his client to arbitrate or to agree to do so in the individual case. He must decide: (a) shall I advise my client to agree to arbitrate before a dispute arises, and if so what and how; (b) shall I advise him to arbitrate after a dispute arises, and if so, what and how; (c) what shall my advice and service be after he has agreed to arbitrate?

To these problems we shall address ourselves. We are not concerned with the broader merits or demerits of arbitration, except as they may affect our individual problem. The real confusion and debate has been caused by the fact that the sponsors of arbitration insist that it is a general panacea for all disputes, a grand and glorious method of business reform, a thing to be sold by generalized propaganda and standardized arbitration clauses. Instead, it should be treated as any other tool in the lawyer's equipment for the settlement of business dispute, accepted or rejected by the same balancing of factors we use in deciding upon a trial, a reference, a settlement, an accord and satisfaction, or even a bland admission that the antagonist is correct in his contention and should be compensated as he contends. Doubtless, admission in every case that one's antagonist is correct would produce frictionless business relations, and assure speedy, quick, friendly and economical settlements of all disputes. The same might be said for compromise. It is no more foolish to look on these as a universal cure-all than on arbitration. But somehow or other the word arbitration has a magic ring.

Until the last few years, advising a client to agree to arbitrate any disputes thereafter arising out of a contract was often a nice method of appearing to insure a peaceful solution to any and all future conflicts, as well as a convenient assistance in obtaining the acceptance of the original document. "If any dispute arises later it can always be arbitrated." Of course, our client may or may not have been advised at the same time that regardless of the Sunday School merits of arbitration the clause could be revoked with impunity.³ But in many states to-day these clauses are absolutely enforceable; business interests have by powerful lobbying induced the passage of statutes which on their face make it mandatory for the court to issue an order compelling arbi-

3. It is clear that agreements to arbitrate future disputes were not specifically enforceable at common law, *Tobey v. County of Bristol*, 3 Story 800 (U. S. C. C. 1845); cf. *United States Asphalt v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y. 1915). It has been authoritatively and positively laid down that only nominal damages could be recovered for their breach. *Munson v. Straits of Dover S. S. Co.*, 102 Fed. 926 (C. C. A. 2d, 1900); 3 WILLISTON, *CONTRACTS* (1920) § 1719. Some doubt has been cast on this by a most recent case: *McCullough v. Clinch-Mitchell Construction Co.*, 71 F. (2d) 17 (C. C. A. 8th, 1934). For a succinct and thorough statement of the law regarding arbitration agreements see also CHAFFEE AND SIMPSON, *CASES ON EQUITY* (1934) 537 et seq.

tration whenever one side refuses thus to settle the dispute.⁴ The courts are not permitted to refuse specific performance of arbitration on grounds which heretofore have influenced chancellors and legal scholars to favor refusal of equitable relief.

Nor can a lawyer in a state not possessing these statutes allow an arbitration clause to be inserted in a contract as a sop to a complaining antagonist or in a hope that it may prove a moral suasion to the parties to arbitrate in cases seemingly fitted for arbitration. The new arbitration laws are being vigorously pushed, and a clause innocently enough inserted may prove irreparably injurious at some later date, should the local state succumb and pass these ill-considered laws.⁵ There is the further fact that Congress has passed the United States Arbitration Act,⁶ applying to arbitration clauses in maritime contracts or those concerning interstate commerce, so that an arbitration clause may prove enforceable in the Federal courts at a time when the state courts will not enforce it. Besides, arbitration is considered procedural from the standpoint of the conflict of laws,⁷ so that if our client is served in any of the twelve

4. ARIZ. CODE (Struckmeyer, 1928) §§ 4294-4301, as amended by Laws 1929, c. 72, 1-4; CAL. CODE CIV. PROC. (Deering, 1931) §§ 1280-93; CONN. GEN. STAT. (1930) §§ 5840-56; LA. GEN. STAT. (Dart, 1932) §§ 405-22; N. H. PUB. LAWS (1929) c. 147; N. J. COMP. STAT. (Supp. 1925) §§ 9, 21-36; N. Y. ARBIT. LAW (1920) c. 925 §§ 1410-1431, as added by Laws 1923, c. 346 § 6-a, id. 1927, c. 352; N. Y. CIV. PRAC. ACT §§ 1448-65, 1469; OHIO GEN. CODE (4 Page, 1932) § 12148 (1-17); ORE. CODE ANN. (1930) §§ 21-101, 21-103, Laws 1931, c. 36; PA. STAT. ANN. (Purdon, Supp. 1932) tit. 5, §§ 161-81; R. I. Acts and Resolves 1929, c. 1408, §§ 1-18; WIS. STAT. (1931) §§ 298.01-298.18. See Popkin, *Judicial Construction of the New York Arbitration Law of 1920* (1925) 11 CORN. L. Q. 329; Frankel, *The New York Arbitration Law* (1932) 32 COL. L. REV. 623; Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding* (1933) 46 HARV. L. REV. 1258. The statutes are set forth in full detail in STURGES, *COMMERCIAL ARBITRATION AND AWARDS* (1930), the modern American authoritative text on the subject and an exhaustive and excellent work. Some lower courts at times seem to remain in blissful ignorance of the purport of these modern acts. Cf. *Clogston v. Schiff-Lang Co. Inc.*, 32 P. (2d) 390 (Cal. App. 1934).

5. The arbitration acts have been held to apply to contracts executed before their passage. *Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 130 N. E. 288 (1921); *Pacific Indemnity Co. v. Insurance Co. of North America*, 25 F. (2d) 930 (C. C. A. 6th, 1928) *Contra*: *Palmer v. Fix*, 104 Cal. App. 562, 571 (1930). Several of the modern acts, however, specifically exempt antedating their passage.

6. 43 STAT. 883 (1925), 9 U. S. C. A. §§ 1-15 (1926). For a discussion of the problems raised by the Act, see Poor, *Arbitration Under the Federal Statute* (1927) 36 YALE L. J. 667; Baum and Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts* (1931) 8 N. Y. U. L. Q. REV. 238, 428; Phillips, *Arbitration and Conflicts of Laws: A Study of Benevolent Compulsion* (1934) 19 CORN. L. Q. 197, 209 et seq.

7. *Meacham v. Jamestown, etc. Ry.*, 211 N. Y. 346, 105 N. E. 653 (1914); *Vitaphone Corporation v. Electrical Research Products Inc.*, 19 Del. Ch. 247, 166 Atl. 255 (1933); 19 Del. Ch. 354, 167 Atl. 845 (1933); 171 Atl. 738 (Del. Sup. Ct. 1934); (1933) 47 HARV. L. REV. 126; (1933) 33 COL. L. REV. 1440. *Contra*: *Hamlyn & Co. v. Talisker Distillery* [1894]

enforcing states, he may be compelled to arbitrate, and inasmuch as the statutes provide for the absolute staying of any suit or proceeding brought in violation of the arbitration agreement, he may find his remedies in the courts of many states barred.⁸ Our clause will not be looked at as moral suasion for arbitration in the proper cases; it will prove to be a legal waiver of all legal rights, an "open sesame" to absolute mandatorily compelled arbitration as the sole method of enforcing a dispute or delaying its solution, regardless of the merits or demerits of an arbitration as a means of properly effectuating the agreement.⁹ To look on such a device as a business toy and not a legal tool seems inane. Furthermore, an arbitration clause should be inserted in a contract only when parties intend to obey it, and a conscientious practitioner should contemplate drafting only provisions which he expects his client to insist on and observe.

The lawyer in allowing an arbitration clause to be inserted in a contract must have a keen eye for the future, must visualize, as he must in considering all other types of clauses in a contract, what will be the effect of this particular clause in various future contingencies. He can not rely upon glib phrases thrown out by associations whose support is partially furnished by the arbitrations they handle, ephemeral shib-

A. C. 202 (the English viewpoint has not, however, been accepted by any American court). A complete discussion of the conflicts problems may be found in Heilman, *Arbitration Agreements and the Conflicts of Laws* (1929) 38 YALE L. J. 617; Phillips, loc. cit. *supra* note 6; Lorenzen, *Commercial Arbitration: International and Interstate Aspects* (1934) 43 YALE L. J. 716.

8. Cf., e.g., *Shanferoke Coal & Supply Co. v. Westchester Service Corporation*, 70 F. (2d) 297 (C. C. A. 2d, 1934); *Matter of Inter-ocean Food Products, Inc.*, 206 App. Div. 426, 201 N. Y. Supp. 536 (1923). Arbitration agreed to in one state may be ordered by the courts of another, *Nippon Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp.*, 170 Atl. 286 (Pa. 1934); *Matter of Inter-ocean Food Products, Inc.*, *supra*. *Contra*: (1934) 47 HARV. L. REV. 1055. An agreement to arbitrate in a particular county of Ohio confers irrevocable jurisdiction in the courts of that county to order arbitration to proceed. OHIO GEN. CODE (Page, 1932) §§ 12148-8. In New York an ex parte arbitration may be had, and thus make service against a foreign resident unnecessary. *Finsilver, Still, and Moss v. Goldberg, Maas & Co.*, 253 N. Y. 382, 171 N. E. 579 (1930). And further, an arbitration agreement may bar one from equitable relief even in a "non-enforcing" state. Cf. *Vitaphone Corporation v. Electrical Research Products, Inc.*, 171 Atl. 738 (Del. Sup. Ct. 1934). In all, the consequences of an arbitration provision may be severe.

9. The delay results in many instances from motions to stay an action brought in violation of an agreement to arbitrate. It is possible for defendants to utilize the stay in unethical ways, and dilatory chicanery is very common. See an examination of the cases and practise in Phillips, *supra* note 6, at 205 et seq. A statement in a recent arbitration decision is most instructive: "By tradition a defendant may ordinarily let a sleeping dog lie until he is bitten. Though he may play with the danger too long." *Matter of Haupt v. Rose*, 265 N. Y. 108, 111, 191 N. E. 853 (1934). Cf. *Murian Frocks, Inc. v. Malamor Dress Corp.*, 152 Misc. 304 (Sup. Ct. App. Term 1934). An arbitration clause seems to assist the sleeping process, and permit much play without danger.

boleths about speed, justice, economy and friendliness, any more than he can ignore the Rule against Perpetuities because his client has been persuaded by a bulletin of the Animal Welfare League that he ought to tie up property for the semi-eternal benefit of Maltese cats.

We cannot ignore the fact, for example, that the nature of arbitration has changed in recent years. To the Middle Age merchant, and in fact up to the time of our modern arbitration acts, the process was more or less a friendly method of settlement of disputes. Awards were compromises; and arbitrators were agents whose authority in effect was limited to securing a settlement which both sides would willingly accept. To compel "arbitration" as used in that sense borders on the grotesque. But arbitration as visualized by modern proponents of the movement, arbitration such as results when an entire industry agrees that disputes should be thus settled, arbitration by which one preempts his right to secure a court disposition of any possible dispute which may thereafter arise between the parties, is no longer a simple agency-compromise, it is a substitute for the courts, termed quasi-judicial by its proponents;¹⁰ which probably means judicial in result, judicial in its nature, non-judicial in its judges.¹¹ The question therefore which the practitioner must consider at the very outset is not: "Am I providing a possible method for avoiding law suits?" but "Shall I provide a method of trial other than the courts for disputes which may arise and need adjudication, and shall I preclude my client from any remedy other than arbitration for the adjudication of the disputes involved?"

Of course, as arbitration clauses are "sold" today, they are so general in their nature as to preempt any kind of court action. For example, the American Arbitration Association recommends the following clause in business contracts:

"Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the Rules, then obtaining, of the American Arbitration Association, and judgment upon the award may be entered in the highest court of the forum, state or federal, having jurisdiction."¹²

A careless practitioner, unaware of the pitfalls which lie in its use, may accept it; but it is submitted that before a general arbitration clause is inserted (in an enforcing state or where there is any possibility of enforcement) counsel must do a great deal of research and consider his

10. CODE OF ARBITRATION: PRACTISE AND PROCEDURE (1931) 75. Cf. *Fidelity & Deposit Co. v. Woltz*, 234 App. Div. 823, 253 N. Y. Supp. 583 (4th Dep't, 1931); Isaacs, *Two Views of Commercial Arbitration* (1927) 40 HARV. L. REV. 929.

11. "Arbitrators are a law unto themselves and may decide according to their views of justice." *Mayberry v. Mayberry*, 121 N. C. 248, 250, 28 S. E. 349 (1897).

12. CODE OF ARBITRATION: PRACTICE AND PROCEDURE (1931) 46, 205.

client's case most carefully. Of course, the same holds true with regard to any standardized document, but to a much lesser degree; for courts will examine other kinds of standardized documents and disregard onerous provisions which they deem to be against public policy. Arbitration clauses, on the other hand, may prevent the courts from passing upon and perhaps moderating harsh substantive provisions of a contract.¹³ Business arbitrators approach cases from an individual and not from a social viewpoint; and provisions which a court would cast aside are only too readily enforced by them.¹⁴

Another disadvantage attending the use of a general arbitration clause is the lessened predictability of the legal consequences of the contract containing it. Many relationships are entered into wherein security of transaction and certainty of result are far more important to the contracting parties than any other single factor. Business dealings in general rest on possible future predictability. In a long-term lease, for instance, or a contract for the manufacture of merchandise to be delivered at some future time, an accurate prediction of the rights to be acquired and duties to be observed is a transcendent prerequisite. Codes of Fair Practice have attempted to increase certainty in business rights. And the law in general is an aid to predictability. But although enforceable arbitration clauses are alleged to make for easy credit and for stabilization in business relations,¹⁵ in reality they introduce tremendous uncertainty in the law that is to be applied to the disputes which may arise. Whether functional or conceptualistic in their approach to law, most counsel are generally egotistical enough to believe that they can accurately predict how the judge will find the law, whether because of their knowledge of psychology and the hidden motives which prompt judge-made wisdom or because of their acquaintance with the guiding principles upon which all judges act. Cases and precedents are examined

13. Cf. (1934) 47 HARV. L. REV. 699.

14. This statement regarding the "nature of the arbitral process" is, in our opinion, incapable of actual proof. It is the result of attendance at many arbitrations, and a careful study of the records of many others. Unfortunately, such records are private, and unavailable for publication. We could, for example, point to an entire New York City industry which habitually uses arbitration, where a vicious limitation of liability provision in the standardized contract in a form legally invalid is sustained almost without exception by arbitrators.

Everything about the proceeding makes for individual and not social justice. Awards are private, arbitrators are encouraged to give no reasons for their decisions, and no precedents are cited to or by them. Their whole attention is on *the* case. Their business training and their business logic is in its very nature individualistic and their decisions not based on social policy, but on the facts before them. Cf. *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 (1930).

15. See Grossman, *Trade Security Under Arbitration Laws* (1926) 35 YALE L. J. 308.

before contracts are drawn. Printed law reports are evidence of what courts may do in similar cases. But there are no records to show the principles by which the individual arbitrator will act. He is a law unto himself. His inspirational decision on law is unpredictable, unassailable, unreviewable.¹⁶ Far better it may be to have no contract at all than to have lay judges misinterpret carefully drawn clauses drafted expressly to conform to case law already decided. Accordingly, if the prime requisite is certainty, the lawyer may well hesitate to permit an arbitration clause to cover such of the issues as demand definite predictability. The modern declaratory judgment statutes have gone far toward providing a succinct method of ascertaining disputed rights in advance; we should think twice before placing in a contract a clause which will forever forbid their use.¹⁷ We should deliberate carefully before providing in effect that the law applicable to a *future* dispute is not the law which our training has equipped us to know; but rather the home-made inspirational logic of the individual arbitrator who, appointed at some future time, ad hoc, may be fortunate or unfortunate enough to sit in judgment of our client.

So, too, we may desire to protect our client's rights against an unscrupulous fellow business man by means of a provisional remedy. Injunction or attachment are very effective methods for the speedy collection of just debts. Receivership is a puissant factor in preventing an unfair disposition of assets. Mechanics' liens are a practical protection in building contracts. Under almost all the modern arbitration acts the agreement precludes these remedies; the entire sphere of court control, once the agreement is made, is spent in ordering arbitration and in staying any other type of proceeding which may be brought.¹⁸ This too should

16. For a discussion of the various rules and cases regarding arbitrators following rules of law see Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration* (1934) 47 HARV. L. REV. 590. The common law rule codified into most of our modern American statutes allows no court review of rulings of law by the arbitrators, and their rulings thereon are final regardless of their departure from accepted legal principles. There are some states which do not follow this rule. See the unusually critical statement in *Matter of Couperie Belge Americaine*, N. Y. L. J., January 19, 1934, at 307, and cf. SECOND REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL (1930) 101-109.

17. Cf. *Newburger v. Lubell*, 257 N. Y. 383, 178 N. E. 669 (1931). The only declaratory judgment which could be granted when the contract contains a general arbitration clause would be that the parties are bound to arbitrate. Cf. *Matter of Flintkote*, N. Y. L. J., May 5, 1933, at 2717. Note also that the mere fact that a complaining party has no case at law, is no good reason for the denial of a motion compelling arbitration under the modern acts. For the courts cannot say how the arbitrators will find the law, nor say that a bona fide dispute is not sufficient for a motion to compel. Cf. *Matter of Palmer & Pierce*, 195 App. Div. 523, 186 N. Y. Supp. 369 (1st Dep't, 1927); *Matter of Wenger & Co. v. Propper Silk Hosiery Mills*, 239 N. Y. 199, 146 N. E. 203 (1924).

18. Cf. Phillips, *supra* note 4, at 1267 et seq.; 48 REPORTS OF THE ASSOCIATION OF THE

be a powerful consideration in determining whether our advice should be towards arbitration clauses in any particular contract.

These two serious deficiencies in the arbitration process make us mindful that we must glance at the generalized reasons which might prompt us to include an arbitration clause in a contract. Why should we prefer this method of trial to that in the courts? The only possible answer is that our court procedure fails to provide satisfactory tribunals for business men, and that an arbitration can remedy the deficiencies.

The proponents of arbitration point out that its speed is so tremendous that the delay in court procedure stands out startlingly by comparison. Is our particular contract the type in which a speedy solution is imperatively demanded; are certainty and provisional remedies to be sacrificed to gain speed? For example, in the case of a contract for the sale of perishable commodities or for the importation of merchandise where duty refunds or protest at commissions' rulings must be claimed immediately, an assurance of a speedy disposition of disputes is far more essential than any other factor. But—can arbitration provide it? Undoubtedly it can if the parties are agreed that an arbitration shall be held; but if they are not, experience under the compulsory arbitration statutes would indicate that astute counsel can delay proceedings with as much success as in an ordinary law suit.¹⁹ As a matter of fact, if both parties are willing to cooperate, a law suit can be speedy; even in our cities where dockets are crowded to a point of disgrace to our legal system, speedy trial by reference or by submission of agreed statement of facts *can* be obtained by normal legal process. But in most cases defendants are in no hurry to settle. And these same defendants will be in no hurry to arbitrate, and instead of prolonging the trial on the merits of the dispute, they will prolong the enforcement of the agreement by the courts and delay the arbitration by means of the same type of selfishness that delays lawsuits. Our courts and our Bar cannot be expected to lose that odd sense of formalism and technicality so wrongfully rampant in procedural formality merely because an arbitration, and not a busi-

BAR OF THE CITY OF NEW YORK (1925) 135; *Louis Michel Inc. v. Whitecourt Construction Co.*, 264 N. Y. 23, 189 N. E. 767 (1934). See *In re Louis Michel Inc.*, 238 App. Div. 480, 265 N. Y. Supp. 165 (1st Dep't, 1933); *Brescia Construction Co. v. Walart Construction Co.*, 264 N. Y. 260, 190 N. E. 484 (1934), *aff'g* 238 App. Div. 45, 263 N. Y. Supp. 13 (1st Dep't, 1933).

19. See, e.g., *Matter of Marchant v. Mead-Morrison Co.*, the legal vagaries of which can be partially found in: 215 App. Div. 759, 212 N. Y. Supp. 869 (1st Dep't, 1925); 7 F. (2d) 511 (S. D. N. Y. 1925); 11 F. (2d) 368 (C. C. A. 2d, 1926); 226 App. Div. 397, 235 N. Y. Supp. 370 (1st Dep't, 1929); 252 N. Y. 284, 169 N. E. 386 (1929); 253 N. Y. 534 (1930); 282 U. S. 808 (1930); *Vitaphone Corporation v. Electrical Research Products, Inc.*, *supra* note 7; Phillips, *supra* note 4; Skeen, Book Review (1929) 17 CALIF. L. REV. 191-92.

ness dispute, is made the subject of court process, at least not so long as their business clients lend every encouragement to the delay. And the delay in an arbitration is not always traceable to the parties or their counsel:

"Is the Queen's Bench dilatory? More so than it ought to be, I admit. But at any rate Her Majesty's judges have no interest in prolonging the proceedings which cannot be said of lay arbitrators whose remuneration expands with the length of their sittings."²⁰

The catalogue of advantages claimed for arbitration has been by no means exhausted. Perhaps the contract is one in which utmost privacy is demanded. For example, an actress, press-agented as salaried at \$2,500 a week, is completely satisfied with and has contracted for \$250 a week. Even though a dispute should arise on the contract, neither party would care to divulge how John Q. Public was misled. A suit, however, would easily do so. Furthermore, publicity regarding other kinds of suits is often ruinous; an attack on quality of merchandise, even though it is later found to be of unequaled merit, is harmful to future sales. Arbitration can prevent this. Is our contract of this sort? But the arbitration must be held without a court order if it is to achieve privacy; once a court order is asked for, the attendant publicity is just as great as in a law suit. And voluntary arbitrations are not always clouded with a veil of secrecy; witness, for example, the famous decision wherein the newspapers proclaimed that arbitrators decided that a baby was not "an act of God"—which incidentally was not held by the arbitrators, but advanced by counsel and reported perhaps by him to the papers. So that even if the utmost secrecy is necessary, it can be obtained only if both parties wish to keep the secret in the individual case.

Then it may be that the parties operate on such a small margin of profit, that the cost of a law suit will mean that even the winner will lose. Here too, arbitration is held out as a panacea. Cheap, certainly, if both parties willingly consent to the process; cheap, certainly, if arbitrators can be found who will serve at a nominal rate of compensation; cheap, if it is not dragged around in courts for years as can be done; but a clause in the contract is no guarantee of cheapness *if* the parties later on should care to prolong the proceeding. There is ample evidence that bitterly contested arbitrations can be as expensive as bitterly contested law suits.²¹

20. Pickstone, *Fallacy of Arbitration* (1896) 101 L. T. 557. In all fairness it should be pointed out that the American Arbitration Association in arbitrations held under its rules provides arbitrators who serve without compensation.

21. Cf. *Vitaphone Corporation v. Electrical Research Products Corporation*, *supra* note 7, an arbitration proceeding costing \$750,000; *Everett v. County of Erie*, 148 Misc. 778, 266 N. Y. Supp. 299 (Sup. Ct. 1933); *Gerdetz v. Central Oregon Irr. Co.*, 83 Ore. 576, 163 Pac. 980 (1917).

The advocates of arbitration point out that it is a voluntary proceeding; that good feeling is prevalent throughout; that future trade will not be lost because of the acrimonious attitude so closely bound up with our adversary system of litigation. True enough, if the parties willingly arbitrate; but after all there is nothing voluntary about a coerced arbitration. Thus, our arbitration clause provides no guarantee of friendly relations in the future; it merely makes possible two steps of acrimony instead of one, a contentious proceeding to enforce arbitration, and a contentious arbitration. There are few disputes over the right to hold a law suit as such, for proper service of process prevents that; there may be many over the holding of the particular arbitration.

And so we could take each and every advantage claimed in general for arbitration and show that the advantage exists only as long as the parties care to arbitrate the particular case. Certainly, if they do care to arbitrate, they can agree to do so after the dispute has arisen; and in almost every state such an agreement is irrevocable. Counsel must therefore consider the facts of the case and find some compelling reason before agreeing in advance to waive certainty, to waive provisional remedies, in return for possible friendliness, cheapness, privacy, speed, which will exist only if the parties still desire to arbitrate *after* a dispute arises.

Looking at the matter realistically, the paramount and only indisputable advantage in arbitration consists in the "expert fact finders" one can obtain to act as judges. The point is often emphasized, but it is too provocative of thought to be amenable to good advertising purposes. Business facts are complicated. Business relationships are obscure except to those well versed in their intricacies. The ordinary uninformed jury is completely at sea, and oftentimes the legally trained judge is unable properly to decide business fact so necessary to a just result in any controversy. Are furs up to sample? A jury cannot even guess intelligently; a judge's mental equipment will not help him decide it; a fur expert acting as an impartial arbitrator knows almost at a glance. An explosion occurs in an oil field; the fault is alleged to be a defective pump. The manufacturer denies it was defective. Is he liable? The question raised in such a case could baffle engineers; an examination of such a problem, which would produce a doze for even the liveliest judge and a sound sleep for an ordinary jury, would prove a thrilling experience to engineer arbitrators. If permitted to decide the case, they might be expected to reach a scientific as well as a just result. Of course, if the arbitrators are to be appointed by a court as a result of a legal motion, the probabilities are that the arbitrators will not be experts; but even in a "compelled" arbitration, there are methods, as will be pointed out hereafter, which will assure expert judges.

The securing of an *expert* judge is a reality for which arbitration could

stand, the thing for which, we presume, business men turn to it in many instances and for which arbitration would be utilized even if we had speedy, cheap and adequate trial sessions. This is what the lawyer must take account of at the start when the client consults him with regard to an arbitration clause. What business facts are likely to be disputed in the course of future dealings which can be determined expertly by arbitrators, and cannot properly be decided by courts? These should be arbitrated; and the arbitration clause should be clearly and specifically limited to them. The same holds true for those "legal" questions which concern "trade custom." What are they? When do they seem likely to arise? These are questions which must be clearly thought through before the arbitration clause is advised and adopted. To these it should apply; to these it should be limited.

Thus properly limited, the arbitration clause will prove in most instances of inestimable value and will escape the drawbacks heretofore mentioned. If the clause be confined to certain types of disputes—the proper, carefully considered types—provisional remedies and equitable relief will still be obtainable. Astute counsel may always find some matter outside the scope of the clause upon which to base his prayer for necessary relief; careful counsel will provide for such relief in his clause. No difficulty will be encountered with predictability; for arbitration, thus limited, will not concern itself with the type of legal rules upon which the parties need the settled decisions of the courts as their guide.

As a matter of fact, when arbitration is properly limited, the necessity of court compulsion will fast disappear in most instances. Few, if any, would resist arbitration on an issue which everyone admits should be fairly submitted to arbitration. The proper clause will furnish the needed moral suasion, and settlement of this type of dispute in and of itself will prevent future litigation on more general lines. Refusal to arbitrate such issues as were carefully thought of when the contract was made, issues concerning business fact or business custom, would brand as a sham a defense to a motion compelling arbitration in most instances. But this is not true in the case of a general clause providing for arbitration of all disputes. Where, for example, a claim may later be made that there was fraud in the procurement of the contract, or that the contract was rescinded or abrogated, or a controversy may arise concerning the interpretation of terms or concerning complicated rules of law, or a need for equitable relief may make itself felt, the English courts could hold there was good reason for not enforcing arbitration;²² but

22. E.g., *fraud*: *Barnes v. Youngs*, [1898] 1 Ch. 414; *Wallis v. Hirsch*, 26 L. J. C. P. 72 (1856), cf. Arbitration Act 1934, § 14(2); *rescission*: *Davis v. Starr*, 41 Ch. Div. 242 (1889); *Modern Road Construction Co. Ltd. v. Melbourne Harbour Trust Commissioners*, [1932] Vict. L. R. 275 (Ct. of App.). But cf. *Matter of Collichaw*, 211 App. Div. 809

the American courts are not, according to the modern arbitration acts, thus allowed to refuse an order compelling arbitration or to stay an action giving necessary relief. Yet in this sort of case, one need not be a keen student of psychology to perceive that the parties did not foresee even the possibility of such a dispute when the contract was entered into; it requires no more than normal insight to realize that the settlement of claims and disputes such as these is not conducive to good feeling, that they are not really fitted for arbitration, that in fact they are of the type which will not be arbitrated if the other party can prevent it. But the converse is true of properly limited types of disputes; and except in cases where parties are of low moral responsibility, arbitration will willingly be accepted. Of course, parties of low moral responsibility will always hedge and stoop to dilatory tactics; with them it is just as well to utilize the law in its full rigor, instead of extra-judicial tribunals.

But suppose you represented a client who signed a contract under which his rights at law were clear; suppose you were absolutely certain, because of the facts and the language in the contract, that he was clearly in the right and needed provisional relief. Ask yourself how you would feel to allow a board of arbitrators who are not bound to find according to law, who cannot grant provisional remedies, who perhaps may compromise, who may find totally against you, to pass on his rights. Would it be any wonder if your client asked to resist arbitration and to obtain a trial at law? Or suppose the contract were of the "take it or leave it" variety, foisted on your client in the course of trade, containing terms which the court would not enforce because of social policy but which arbitrators invariably would? Would you complacently sit by and willingly submit to arbitration when you realized your client had unthinkingly been "sold" arbitration as a commodity, not as a legal tool? Would you talk in terms of abstract platitudes to him and remind him of the speed, justice and economy of arbitration in general?

You should not be too discouraged, however, if such a client comes to you with an all inclusive arbitration clause after a dispute has arisen in a case in which arbitration is an ill fitted remedy, and for which the courts are clearly superior. The English courts recognize this as a suitable ground for revocation of an arbitration agreement, though *prima facie* the duty of the court would be to hold otherwise.²³ If other states

(1924); *interpretation of terms*: *Printing Machinery Co. Ltd. v. Linotype & Machinery Ltd.*, [1912] 1 Ch. 566; *complicated legal problems*, *East & West India Dock Co. v. Kirk & Randall*, 12 A. C. 738 (1887); *Robert Davis Workman v. Belfast Harbour Commissioners*, [1899] 2 I. R. 234.

23. See, e.g., *Lyon v. Johnson*, 40 Ch. D. 579 (1889); *Joplin v. Postlethwaite*, 61 L. T. R. 629 (Ct. App. 1889); *Zalinoff v. Hammond*, [1898] 2 Ch. 92. When there is need of relief such as equity alone can give, the English courts may disregard the arbitration provisions; e.g., *Jack v. Bell*, 36 Sol. J. 760 (Ct. App. 1892); cf. *Pini v. Rancoroni*, [1892] 1 Ch. 633.

follow New York in its interpretation of the modern arbitration law, they will overlook the mandatory wording of the modern arbitration act, and, while rendering lip service to the grandmotherly solicitude of the legislature, find methods to avoid benevolent compulsion of an allegedly voluntary act. The New York courts have developed an amazing series of anomalous technicalities²⁴ in connection with motions to order arbitration, and these are sometimes available to counsel if he has a case which he honestly believes ill fitted for it. And similarly, an award which is "too" contrary to law and fact may be vacated by the self-same methods. To be sure, such an award will call forth positive judicial statements that the rulings of the arbitrators are final both as to law and fact, and unreviewable by the courts; but strong statements to this effect are at times immediately followed with quaint trivialities which cause the court to overthrow the award. *Richard Meinig Co. v. Katakura & Co. Ltd.*²⁵ contains a remarkable dictum, which "lets us in" on the judicial subconscious. There an award was attacked on the ground that the arbitrator was "prejudiced as a matter of law." The court after long discussion overruled the contention, sustained the award and then added this tell-tale gem:

"While we are not (1) concerned with the merits of the controversy, nevertheless, we feel it is only fair to say that an examination of the exhibits and other proof indicates quite clearly that a proper disposition of the questions involved was made by . . . the board of arbitrators."

Counsel can ill afford to rely on the rather positive statements contained in professional brochures about the finality and certainty of arbitration agreements and awards. By proper logic—shall we say—he may still be able to obtain justice for his client. We do not ordinarily approve of foolish technicality, but we get an inward glow of satisfaction when we see the courts evade a statute passed in a vicious form by a somewhat bewildered legislature at the high-powered lobbying behest of sincere, but none the less erroneous, business philosophers turned legopanaceans. Nevertheless, the technicalities are not always availing; they are of necessity unreliable. But if counsel is convinced arbitration is "dead wrong" and unfair to his client, he should not give up hope.

We see nothing unethical in advising a client who has previously agreed to arbitrate all disputes thereafter arising out of a contract, to seek court relief when it is clear that the contingency which arises was not

24. See the citation of cases in Phillips, *supra* note 4; (1934) 47 HARV. L. REV. 699, 1055; Legis. (1934) *id.* at 1036, 1041-44.

25. 241 App. Div. 406, 272 N. Y. Supp. 735 (1st Dep't, 1934). We have heretofore attempted to develop cases showing how awards may be overturned when palpably contrary to law and fact, Phillips, *supra* note 16, at 607 et seq.

thought of when arbitration was agreed to, and when it is clear that arbitration is not the proper remedy to apply to the case. In the first place, when it was agreed to, it was assumed to be a friendly, speedy, cheap, expeditious method of adjudication. If facts are such that it cannot prove to be that any longer, it seems foolish to preserve the empty shell, to continue a proceeding in name alone an arbitration, merely for the form of an agreement and not for its substance.²⁶ Furthermore, in such cases there seems to be much support for the old philosophy that it is against public policy to "oust courts of their jurisdiction," by general arbitration clauses.

Interestingly enough, in most states not having modern arbitration laws, where general arbitration agreements are held to be revocable, a properly drawn arbitration clause, limited in its scope to factual disputes and not applying to ultimate liability, is held to be irrevocable.²⁷ Accordingly, by properly limiting a clause, counsel may obtain an almost universally enforceable arbitration; but if a generalized one is used, no one except a modern Delphic Oracle or a student in a law examination can predict what vicissitudes it may encounter. The limited clauses, unlike the general ones, are said not to "oust courts of their jurisdiction." The "ouster" objection may be a bit inartistically worded; certainly no one would object to the voluntary settlement of cases out of court. But that courts should be forced to refuse their aid when it is needed, that they should be compelled to stand idly by and dissipate their energies ordering parties to stay out of court and to obtain justice by means of an arbitration proceeding which cannot provide it, is a bit tragic, if not against public policy. What is counsel's function if not to obtain justice by fair trial for his client? What purpose do our courts serve, if not to act as best they can in cases in which their services are imperatively needed? Private tribunals are well worth while in their place, but when they can no longer furnish the advantages which are claimed for them, when they no longer can dispense justice, it is the duty of courts to step in and adjudicate the disputes between the parties.²⁸

When previous to a dispute the parties have not agreed to arbitrate, little difficulty arises. Counsel is easily able to weigh the factors in

26. When an arbitration for any reason proves abortive the English courts will disregard the arbitration agreement. See *Hamlyn & Co. v. Talisker Distillery*, [1894] A. C. 202; *Cameron v. Cuddry*, [1914] A. C. 651, 656. And cf. *Norwich Union Fire Insurance Society v. Cohn*, 68 F. (2d) 42 (C. C. A. 10th, 1933); *Johnson v. Crawford*, 212 Pa. 502, 506, 507, 61 Atl. 1103 (1905).

27. See *Jones v. Enoree Power Co.*, 92 S. C. 263, 75 S. E. 452 (1912), and the many cases cited by STURGES, op. cit. *supra* note 4, at 71 et seq.; see also *Blodgett Co. v. Bobe Co.*, 190 Cal. 665, 214 Pac. 38, 26 A. L. R. 1070 (1923). But see *Hartford Conn. Fire Ins. Co. v. Hon*, 66 Neb. 555, 92 N. W. 746 (1902).

28. See note 23, *supra*.

favor of and against an arbitration, and except when thought mutually advantageous the dispute will be otherwise settled. We have heretofore stated many factors which will be pertinent. If parties are friendly and level-headed enough after a dispute arises to agree to arbitration, the proceeding will generally be carried through immediately with much speed and satisfaction. Should only the issues needing "expert judges" be submitted? That depends upon the needs of the individual case; counsel will be able to balance the necessary considerations as they are presented. It would indeed be an unusual situation were only some parts of the dispute submitted to arbitration, and the remainder made the subject of an action. In the nature of things it is unlikely that this would happen or be agreed to. For generally the solution of the factual difficulties will end the dispute; if they are not of that nature, the submission will not be entered into in normal cases. And submission agreements made in proper form are almost universally enforceable by the courts.²⁹

It is queer that the advocates of commercial arbitration have made light of submissions of existing disputes. They say an agreement to arbitrate rarely can be obtained after a dispute arises. This may be an indictment of the arbitration process itself; it may be an indictment of business men for being actuated by personal reasons in refusing to submit, but at least it is not an indictment of the law. It seems strange that if arbitration is all its sponsors claim for it, the parties to a dispute will not agree to it after a dispute arises. The English experience shows that they do, in cases of a type needing it for their solution.³⁰ The difficulty in the generalized arbitration clause sold in advance by generalized catchwords is that it compels arbitration in cases where, if the parties had knowledge of all the facts, as they do when they enter into a submission of an existing dispute, they would under no circumstances agree to arbitrate.

There are many points of detail which a lawyer should consider after he has decided on arbitration. The arbitration agreement should be carefully drafted.³¹ This includes more than mere language. An arbi-

29. Cf. CHAFFEE AND SIMPSON, *CASES ON EQUITY* (1934) 552 et seq.; STURGES, *COMMERCIAL ARBITRATION AND AWARDS* (1930) c. VII.

30. "Finally there is a well confirmed tradition among business men, even though there is no written contract covering a particular dispute, to submit differences to arbitration after they have arisen." Rosenbaum, *Commercial Arbitration in England* (1916) BULL. XII AM. JUD. SOC. 7.

31. The decisions of courts interpreting arbitration clauses under the modern arbitration laws where even the slightest ambiguity can be alleged, are most unusual, conflicting, and generally puzzlingly restrictive. E.g., see *Young v. Crescent Co.*, 240 N. Y. 244, 148 N. E. 510 (1925); *Smith Fireproof Construction Co. v. Thompson-Starrett Co.*, 247 N. Y. 277, 160 N. E. 369 (1928); *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252

tration to be successful needs careful administration, impartial arbitrators, and an assurance that there will be no lapses in the proceeding. Lawyers are as a rule too busy to attend to the administrative details, clients too uninformed as to what is necessary, arbitrators too uninterested as well as busy to see that they are performed. And the administrative details are many: sending notices of hearings, arranging therefor, providing hearing rooms, and so forth; and lack of proper administration may result in an invalid award and future litigation.³² Trade associations are available to tend to such matters for a nominal charge and should if possible be utilized.

The services of trade associations or associations specializing in arbitrations, such as Chambers of Commerce or the American Arbitration Association, can be employed for purposes other than the administration of detail. If the parties have provided merely for arbitration, it is almost inevitable that disputes will arise regarding the procedure to be followed in the process itself. For example, difficulties will arise concerning the method to be followed in selection of arbitrators, regarding the times the hearings should be held, the rules of evidence to be followed, adjournments and so forth. To provide for all the possible contingencies in the contract would require a most bulky document and would necessitate much experience on the part of the drafting attorney. Furthermore the provisions would be so complicated and technical that such contractual control is generally impractical. Fortunately many trade and arbitration associations have rules for the conduct of an arbitration which can be utilized,³³ and which may be made legally binding in most instances through incorporation by reference in the arbitration clause or submission agreements.³⁴ Without them, arbitration

N. Y. 284, 169 N. E. 386 (1929); *Matter of General Footwear Corp. v. Lawrence Leather Co.*, 252 N. Y. 577, 170 N. E. 149 (1929); *Stange v. Thompson-Starrett Co.*, 261 N. Y. 37, 184 N. E. 485 (1933); *Lehman v. Ostrovsky*, 264 N. Y. 130, 190 N. E. 208 (1934); *In re Lehman*, 269 N. Y. Supp. 940 (Sup. Ct. 1934), *aff'g* *Lehman v. Ostrovsky*, N. Y. L. J., January 3, 1934, at 31, col. 1; *cf. Katakura & Co. v. Vogue Silk Hosiery Co.*, 307 Pa. 544, 161 Atl. 529 (1932). But *cf. J. H. Leavenworth & Sons, Inc. v. Kimble*, 157 Miss. 462, 128 So. 354 (1930); (1934) 47 HARV. L. REV. 699.

32. *Cf.*, e.g. *Blakely Oil & Fertilizer Co. v. Proctor & Gamble Co.*, 134 Ga. 139, 67 S. E. 389 (1910); *Karapschinsky v. Rothbaum*, 177 Mo. App. 91, 163 S. W. 290 (1914); *Kopp v. Grobart*, 12 N. J. Misc. 488, 172 Atl. 733 (1934).

33. A very complete collection of such arbitration rules may be found in *YEAR BOOK OF COMMERCIAL ARBITRATION* (1927). See also *BATES, PLEADING, PRACTISE, PARTIES AND FORMS* (4th ed. 1932) 809, for an ingenious device to eliminate the necessity of trade association administration by providing an impartial lawyer to attend to all administrative detail. The device in addition lays down an excellent procedural guide for the conduct of an arbitration, and like trade association rules may be incorporated by reference into an arbitration agreement.

34. A citation and discussion of cases and authorities supporting and enforcing rules may be found in *Phillips, supra* note 16, at 619 et seq. It should be noted that the parties

even in a properly chosen case may well turn into a quibble over procedure; and such disputes almost always lead to future litigation concerning the merits of the proceeding and frequently court nullification of the award.³⁵ With proper rules, if the right type of question is submitted, the proceeding should be orderly, and lapses in the proceeding through neglect by the parties of the necessary steps may be cured by the administrative agency acting on their behalf. If questions by any chance arise concerning the interpretation of the rules, an arbitration committee will generally be present to resolve the controversy. But the rules must be carefully selected in the first place; many of them are poor and will cause more difficulties than they solve. Others are excellent and facilely workable. Care should be taken that the secretary of the association is well informed on arbitration procedure and is of absolute honesty; for on him, rather than on letter-head officials of the organization, the burden of administration will fall.³⁶ Proper rules backed by proper administration will assist immeasurably in making any proper arbitration a success. Counsel's problem is to decide upon the right rules in advance.

The most important personages in an arbitration are not the parties, nor their attorneys. It is the arbitrators who hold the place of honor. Upon them rests the ultimate responsibility. In the past the method commonly used for their selection was for each party to appoint one arbitrator, these two to appoint a third. Despite positive language by appellate courts about the necessity of impartial arbitrators,³⁷ they must have known, as former practising attorneys, that the method of selection made this an impossible ideal. Arbitrators thus appointed by the parties are selected usually because they are advocates. Thus in practice the

have a wide range for contractual control over the arbitration procedure. The Arbitration Acts lay down a few procedural requirements, but these, and those evolved by the courts, may be modified by contract when necessary. Thus, well drawn rules, in addition to creating a definite procedure for situations not covered by law, can avoid legal rules for the conduct of arbitration which are not in accord with business practice or the needs of the individual case. Cf. *Christenson v. Cudahy Packing Co.*, 193 Cal. 635, 247 Pac. 207 (1897).

35. Cf., e.g., *Tutien v. Hudson Valley Coal & Coke Co.*, 230 App. Div. 419, 245 N. Y. Supp. 125 (1st Dep't, 1930), *aff'd*, 256 N. Y. 530, 177 N. E. 127 (1931) (method of selection of arbitrators); *Thornton v. Thornton*, 154 Ky. 692, 159 S. W. 532 (1913) (adjournments); *Berizzi v. Krausz*, 239 N. Y. 315, 146 N. E. 436 (1925) (rules of evidence). It should not be supposed that good rules will always avoid such disputes, but they can go far in doing so. Cf. *Matter of Gerli*, 258 N. Y. 484, 180 N. E. 243 (1932); *Skinner, Cook & Babcock v. Fourth Church of Christ, Scientist*, 238 App. Div. 573, 264 N. Y. Supp. 812 (1st Dep't, 1933); *In re Albert*, 146 Misc. 811, 262 N. Y. Supp. 795 (Sup. Ct. 1932).

36. See *Wilson v. Wilson*, 18 Colo. 615, 34 Pac. 175 (1893).

37. Cf. *People v. Lindsey*, 86 Colo. 458, 283 Pac. 539 (1929); *Matter of American Eagle Fire Insurance Co. v. New Jersey Insurance Co.*, 240 N. Y. 398, 148 N. E. 562 (1925).

"third man" became an umpire and willingly accepted any compromise which the advocates could arrive at. Occasionally the three did render a clear cut decision on the merits, but no one expected that they would.

Accordingly, many lawyers condemned and shunned "arbitration" on the ground that it usually resulted in a compromise. Certainly it is in general rather fantastic to agree in advance, in a contract which aims at the establishment of definite rights, to settle all disputes by a device which always results in a compromise. There may, however, be occasions where this is the proper expedient. For example, merchants who have done continuous business with each other over a long period of time may want to compromise their disputes but may be too proud to do their own compromising. They can preserve their self-respect by allowing "arbitrators" to do it for them. In such a case, arbitration by two advocates and an umpire should be provided for. In the normal case, however, when compromise is the proper method for the settlement of a dispute it can be effected by the parties and counsel's own efforts without going through all the trouble of an arbitration. The condemnation of all arbitration as compromise is, however, no more justified than the propagandists' generalized praise. For an arbitration is very different where the arbitrators are impartial experts, interested in determining truth and not merely in arguing a client's viewpoint.

Trade association rules provide many methods for selection of expert arbitrators and provide devices which will assure impartiality and not advocacy. These associations generally have panels of arbitrators composed of leading experts in various trades and professions, whose honesty is unimpeachable. From lists submitted to each party, impartial experts satisfactory to both sides can be mutually selected, administrative details being handled by the trade association.³⁸ It should be borne in mind that the arbitrators are generally not chosen until after the dispute arises,³⁹ but that the method of appointment may be agreed to long in

38. Cf. Rules II, III and IV of the American Arbitration Tribunal for an excellent system for thus assuring proper arbitrators and proper administration; the YEAR BOOK OF COMMERCIAL ARBITRATION (1927) sets forth many similar set-ups.

39. "Although the parties may exercise their right to name the arbitrators in the clause at the time the contract is made, it is not desirable. Under the Arbitration Rules it is not encouraged, for the following reasons: (1) The names of the arbitrators, when fixed in the clause, may make them part of the contract, and they cannot be removed or the vacancy filled without the written consent of all the parties to the contract. (2) Persons named in the clause may die or be absent or be otherwise unavailable at the time a controversy emerges and the difficulty of choosing a successor in the heart of the controversy is thereby increased. (3) The status of the arbitrators may have changed, rendering them incompetent or, by reason of their changed relation to a party, open to the suspicion of partiality. (4) The arbitration may be held in a place remote from the residence of the named arbitrators, adding greatly to the expense and inconvenience of their service. (5) The parties may have selected persons qualified to deal with one class

advance. Hence the lawyer's task is to select and secure assent to the method which will provide the best type of panel for his client's purposes. If arbitration is wanted for real determination of fact or business custom, every effort should be made to assure expertness and impartiality. But in the few cases where compromise is wanted, this type of arbitration is out of place.

Arbitrations even with expert impartial arbitrators will occasionally result in a compromise. Herein lies an advantage of an arbitration over a law suit in particular cases. Juries and judges are bound to find for the plaintiff or defendant and can use "burden of proof" to satisfy their consciences, appellate tribunals and rules of law. But arbitrators having fairly determined on the facts that there is no real "right or wrong" may render a fair decision in accord with business custom and business need. For example: "The goods are somewhat inferior to sample, but the buyer should accept them with an allowance of two cents a yard." In these instances arbitration has not been used for compromise, but for expert determination of fact, and as a result of this a just verdict has been reached by means of compromise.

The actual choice of individual arbitrators is difficult, and presents as a rule many problems which can be solved only by experience and careful study of the individual facts and the individual personages involved. There are, however, two incorrect notions more or less prevalent which may be dispelled. It is generally supposed that, if one's client belongs to one walk of life and the antagonist to another, a person in the latter's category would make a "bad arbitrator" in a case involving primarily the antagonist's actions. This is probably true if one's client is totally wrong, but we are interested in controversies where counsel is trying to reach a just solution by arbitration. A series of cases close to the heart of the profession brings the point home. We have witnessed innumerable arbitrations where, of all things, a lawyer was trying to collect a fee from a business man. The lawyer and administering trade association invariably advised the choice of an outstanding lawyer for the arbitrator. The businessman and his counsel, the latter mirroring perhaps the natural sentiments of the client, would have no lawyer to pass on the dispute. And so the layman secured a layman for an arbitrator, and the lawyer received an award much larger than he deserved in all the cases. For he presented a mass of records of how much *he*, a lawyer, did. Pleadings apparently indicating days of work (which a lawyer-arbitrator would have recognized as form-book copies), complicated memoranda of law (which bore striking resemblance to a magnum opus of a last

of controversies, as for example, questions of quality whereas the controversy that arises may concern a wholly different question wherein the arbitrators named are not experts." *CODE OF ARBITRATION: PRACTISE AND PROCEDURE* (1931) 50-51.

year's law review editor), many, many diary entries, and so forth, all but overwhelmed the business arbitrator. In fact, he probably came away with great respect for the profession. A well selected lawyer arbitrator would make short work of such matters. The complaining lawyer would obtain his just due before the latter, but no more. None but a professional man can accurately know what professional work means. The same principle holds in all kinds of similar disputes; and the honesty of the arbitrator, his professional standing, and knowledge of the trade assure a fair result;⁴⁰ without such knowledge, it will not be obtained.

On the other hand, where the "facts" in question depend on conflicting viewpoints, the choice of arbitrators is very difficult. A buyer arbitrator will look quite differently at quality on a falling market than a seller arbitrator, a factor will have a different viewpoint on customs of the trade than will a manufacturer. In this type of case there are few who can free themselves from class consciousness which is bound to affect their decisions. A "personally impartial" arbitrator from each class should probably be chosen, with a neutral lawyer to make the third member of the board in most instances.

If the case involves conflicting testimony of "event fact" as distinguished from "business fact," beware of the outstanding expert; he has often lost the common touch, even as juries may have too much of that feeling. Despite all the criticism of juries, a study of many arbitrations has convinced the writer that outstanding business experts, valuable as they may be in determining disputed fact when its solution depends on knowledge of the trade, do not have the skill and finesse of many juries when it comes to detecting a lie. Certainly a lawyer is their superior, while a judge will in almost any case render a just and accurate verdict as opposed to the guess which the expert will render. There is nothing about a business expert's training or experience which should make us expect that he should become an expert fact weigher. A business man will almost invariably utilize the parole evidence rule to an extent unthought of by the strictest judicial mind; he will know no exception to the written document under any circumstances. A caveat should ever be present in choosing an expert arbitrator, and a really thoughtful analysis of what type his case is must be made by counsel if his client's rights are not to be prejudiced.

Many things must be considered in preparing a case before arbitrators. There are tricks of the trade, just as there are before juries,

40. An arbitrator is not disqualified because he is engaged in the same business or profession as one of the parties. *Newburger, Henderson & Loeb v. Rose*, 228 App. Div. 526, 240 N. Y. Supp. 436 (1st Dep't, 1930), *aff'd* 254 N. Y., 546, 173 N. E. 859 (1930). But the fact that he is totally ignorant in the field of dispute will not disqualify him either. *Ross v. German Alliance Insurance Co.*, 86 Kan. 145, 119 Pac. 366 (1911).

judges or referees. Business arbitrators frown on technical objection, like to question witnesses themselves, and counsel would do well to keep himself in the background as much as possible—which means more thorough preparation for the hearing than would otherwise be the case. The client should be permitted to tell his own story uninterrupted, should be questioned only after he has completed his tale, and only in vital matters which he may have omitted. Moreover, it will prove profitable to offer to let the arbitrators cross-examine one's witnesses. Another point worth remembering is that expert witnesses are superfluous and are likely to arouse the ire of the arbitrators; for experts, relying upon their own judgment, feel themselves perfectly capable of telling what is going on in the trade and judging business fact and business custom. In fact, one of the real advantages of having an expert arbitrator is that it eliminates the necessity of expert witnesses, counsels' energy being entirely directed to seeing that the arbitrators obtain enough business fact to render thereon their own expert opinion. Thus, samples of merchandise should be preserved, and exhibited and emphasized. A wool man will render a fairer verdict if he can see and examine the merchandise, than if he merely hears about it; certainly a wine taster would enjoy the sapidity of wine more than a description of its qualities. Moreover, when correspondence is significant, the client's entire file should be presented. Business men are used to seeing whole files and not parts of them; they are suspicious of carefully selected letters and will not believe that counsel has kept others out because of an instinctive following of strict rules of evidence which they are under no duty to observe. They do not know the distinction between letterpress and carbon. An opponent's objection to the submission of an entire file will not hurt one's cause; many business arbitrators have such a cordial dislike of "the law" that citation of authority is likely to react against the citing side. Client's argument is more effective than his counsel's. Arbitrators pay more attention to a good opening statement than to a closing argument. Finally, the client can frequently give his counsel sound advice regarding business logic which will appeal to lay judges far more than legal reasoning. On the whole, however, one can formulate no set rules; a combination of the individual case, the particular arbitrator and experience will determine how to prepare and present an arbitration. This is perhaps what makes the proper presentation and preparation of a case for arbitration so difficult and intriguing.

Certain it is that arbitration lacks the simplicity we have learned to attach to the sound of the word. Arbitration is a means, not an end. As a word it connotes nothing, assures nothing, and promises nothing. The great difficulty is that the sponsors of the alleged arbitration movement have set it up as an end in itself. We have been led to think of

it, and not the case which may or may not need it. Thinking of it in general terms has led to support and opposition to arbitration in and of itself, with concomitant meaningless opposition and meaningless propagandization. But so long as the profession speaks of arbitration in terms of generalized praise and damnation, it must be expected that our clients will act on business editorials rather than on sound legal advice.

For the lawyer to resist the spread of arbitration would be as futile as the ill-fated experiment of King Canute. Our primary task is to provide the business man with better courts and with legal methodology which accord with his needs and modern conditions. But until we do so, we must utilize our present tools to the best advantage. Arbitration is a new piece of machinery, perhaps a temporary substitute, perhaps a permanent one, but a piece of machinery and nothing else. Our job is to learn to utilize it along with our other tools in the most efficient way. Legal tools should be accepted only after proper legal advice, and not pounced upon willy-nilly by business men reacting to verbal tomtomery. If the lawyer looks upon his case and not upon arbitration as *the* res, and gives sound advice on this basis, balancing arbitration along with all the other means available, he will perform a real service to his clients. Business will become educated to the use of legal tools by lawyers, and will utilize or reject this particular tool as necessity indicates. Having thus been properly used and limited, arbitration will provide speed, privacy, economy, friendliness, and expert judgment; the paradox of court compulsion will fast disappear, the number of awards vacated will diminish, and the technicalities under the modern arbitration acts will become relics of the past.